NO. 84-1983

84-1983

Office-Supreme Court, U.S.
FILED
JUN 21 1985
ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

WINSTON WEN-HSIUNG TSAI

Petitioner

vs.

ROBERT CHENG LIANG LI
AND BETTY HSIU FENG LI

Respondents

PETITION FOR A WRIT OF CERIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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Petitioner, Pro se

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QUESTIONS PRESENTED

1. Has petitioner been deprived of his right to due process of law when the Superior Court of the District of Columbia created a new theory and cause of action for the jury to decide, upon which theory the cause was neither set forth in the complaint, nor briefed, nor urged upon the Court at trial?

2. Were petitioner's rights to due process under the Fourteenth Amendment violated when the trial court permitted a District of Columbia attorney to testify the applicable standard of care, skill, prudence and diligence required of Maryland attorneys in a malpractice claim?

3. Has the petitioner been deprived of his right to a fair trial, as guaranteed by the due process clause of the Fourteenth Amendment, when the District of Columbia Court of Appeals affirmed the

trial court's decision on the malpractice where the loss of downpayment in question resulted from the bankruptcy of a construction company and there was no evidence to suggest that the petitioner proximately caused the damage?

LIST OF PARTIES

The names of all parties to the proceedings in the District of Columbia Court of Appeals are contained in the caption of the case in this Court.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

WINSTON WEN-HSIUNG TSAI,

Petitioner,

v.

ROBERT CHENG LIANG LI
and BETTY HSIU FENG LI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

OPINION BELOW

The order of the District of Columbia Court of Appeals dated March 26, 1985 denying a Petition for Rehearing en Banc is unreported. It appears in the Appendix hereto. (App. 1).

The memorandum opinion and judgment of the District of Columbia Court of Appeals, dated February 13, 1985, is un-

reported. It is contained in the appendix of this petition. (App. 2). The Judgment of the Superior Court of the District of Columbia dated May 21, 1982 is also unreported, but is contained in the appendix of this petition (App. 22).

JURISDICTIONAL GROUND

The date and time of entry of the judgment of the District of Columbia Court of Appeals sought to be reviewed is February 13, 1985. A Petition for Rehearing en Banc was denied on March 26, 1985. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C. §1257(3), which permits review of final judgment, rendered by the highest court of a state in which a decision could be had, where a right is specially set up or claimed under the United States constitution.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> . . . (N)or shall any State deprive any person of . . ., liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

This was an original civil action for a legal malpractice claim brought by the Respondents, husband and wife, against an attorney, the Petitioner herein, to recover the loss of downpayment on restaurant construction and equipment purchase when the construction company went bankrupt.

Respondents are residents of the State of Maryland. Petitioner, who has been engaged in the practice of law in the District of Columbia and the State of Maryland is also a resident of Maryland.

In March, 1975, Respondents requested Petitioner to form a corporation known as Pagoda International, Inc. (hereinafter referred to as "Pagoda Corporation"). It was duly registered in the State of Maryland. Respondents, their brothers and sisters-in-law were major shareholders. In July, 1975, Pagoda Corporation entered into a lease agreement with the landlord for a certain restaurant premises in the Willoughby Building

at Chevy Chase, Maryland. Pagoda Corporation also made an agreement with Carpel Equipment Corporation (hereinafter referred to as "Carpel Corporation") to purchase restaurant equipment and to construct a Chinese restaurant on the leased premises. Carpel Corporation had been doing business of restaurant remodeling and selling restaurant equipment for over twenty (20) years in Maryland, the District of Columbia and Virginia. There were at least three meetings between Respondents and Mr. Maury Rosenfield, President of Carpel Corporation in June and July, 1975 to discuss, bargain and negotiate the sales price and financing of restaurant equipment and construction. Prior to their leaving for Canada on a vacation, Respondents gave a Power of Attorney to Petitioner granting him full authority to negotiate and execute the

lease agreement and the purchase agreement. On July 19, 1975, the sales and purchase agreement was signed between Carpel Corporation and Pagoda Corporation. It provides the terms and conditions of payment, restaurant construction and quantity of equipment to be delivered to the premises. The total sales price was $125,589.28, payable as follows: the downpayment in the amount of $37,589.28 to be paid at the execution of the sales agreement and the balance of sales price to be financed by a bank. Pursuant to the agreement, Respondents gave a check in the amount of $37,589.28 as down payment to Carpel Corporation. The loan was subsequently approved for Pagoda Corporation by Citizen's Bank of Maryland. During Petitioner's absence for a trip to Taiwan from August 10, 1975 to August 31, 1975, Respondents directly negotiated with Carpel Corporation concerning contract changes. As a result of numerous revisions

in the design and changes of equipment, lay-out and construction plan requested by Respondents, an amended agreement was entered into between Carpel Corporation and Pagoda Corporation on Oct. 15, 1985. The total sales price was raised to $141,741.05. Respondents gave a second check in the amount of $4,993.04 to Carpel Corporation to cover the differences of the down payment in the amended agreement. Mr. Rosenfield entered hospital on Oct. 20, 1975 because of a sudden heart attack and Carpel Corporation went bankrupt on Oc. 31, 1975. Carpel Corporation could not finish the construction of the restaurant. Immediately thereafter, an investor put a substantial amount of capital in Pagoda Corporation making it possible to complete the construction of the restaurant and the purchase of restaurant equipment. A year later, Respondents sold their shares of stock in the corporation to a third party for a profit.

An action was commenced in the Superior Court of the District of Columbia with the filing of a complaint against Petitioner.

Count I of the Complaint alleged attorney negligence in not providing ordinary and necessary safeguards as required by an attorney of ordinary prudence. Count II alleged gross negligence in disregard of Respondent's interest. Count III alleged that Petitioner has breached his contract with Respondents as their attorney. Count IV alleged breach of trust as a fiduciary. Answer was filed by the Petitioner, pro se, denying the allegations and praying for the dismissal of the Complaint.

A trial by the jury of six jurors was held from May 17, 1982 to May 20, 1982. At the close of Respondents' case, Petitioner made a Motion for Directed Verdict on the grounds (1) that the Respondents' evidence was insufficient as a

matter of law to show that the Petitioner had breached a duty of care, (2) that the Respondents failed to show that Petitioner's conduct proximately caused the damage and (3) that the Respondents failed to show that they had suffered any damage.

Finding that there has been inadequate evidence to let the matter go to the jury, the trial court properly dismissed all of Respondents' allegations in the complaint, but created a new issue of negligence for the jury to decide: i.e., whether Petitioner has deviated from the standard of care for failure to segregate the portion of down payment for restaurant equipment, a theory of recovery against an attorney, which was not set forth in the Complaint and Pretrial Statement, nor urged upon the Court, nor amended by the Respondents.

Following trial, a verdict for compensatory damages in the amount of $25,529.24 was returned in favor of Res-

pondents.

Pursuant to D.C. Superior Court Rules-Civil Rules 50 and 59, Petitioner moved the trial court to set aside the verdict returned by the jury and notwithstanding the verdict, to enter judgment in his favor. In the alternative, the Petitioner moved the court to grant him a new trial or to grant a remititur.

The court denied the motions on June 12, 1982. Petitioner appealed to the District of Columbia Court of Appeals, setting forth errors committed by the trial court which denied Petitioner a fair trial and deprived him of his right to due process, including the issue raised herein with respect to the trial court's unconstitutional instruction to the jury on the new theory of recovery against an attorney.

Petitioner raised four aspects of errors.[1]

A timely petition for rehearing en banc was filed in the District of Columbia Court of Appeals for the following reasons:

1. The sole issue of negligence in failing to segregate the downpayment for equipment which went to the jury had never been raised by the Respondents in their complaint and trial statement, nor did the

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1a. The trial court erred in denying the petitioner's motion for a directed verdict where the Respondents had failed to make a prima facie showing of the applicable standard of care by qualified expert testimony.

b. The trial court erred in allowing the jury to consider the issue of attorney's duty to segregate the down payment for restaurant equipment where the Petitioner's conduct could not proximately cause the injury.

c. The trial court erred in granting the Respondents as individual shareholders to bring an action against the Petitioner for the alleged wrong to the corporation where the Respondents have sustained no damage.

d. The trial court erred in failing to instruct the jury on the questions of contributory negligence, assumption of risks, ratification and estoppel.

complaint specify such negligent act of Petitioner.

2. Petitioner's motion for a directed verdict should have been granted where the Respondents had failed to make a prima facie showing of the applicable standard of care by qualified expert testimony.

3. Petitioner's actions were not, as a matter of law, the proximate cause of Respondents' damages.

On March 26, 1985, the Court of Appeals entered its order denying the petition for rehearing en banc. In this Petition, this Court is asked to vacate the judgment of the District of Columbia Court of Appeals on the ground that Petitioner was denied a fair trial as guaranteed by the Due Process clause.

REASONS FOR GRANTING THE WRIT

1. Procedural due process requires that "it must be clear that the parties

understand exactly what the issues are when the proceedings are had." Conair Corp. v. N.L.R.B., 721 F.2d 1355, 1372(D.C. Cir. 1983) quoting Kuhn v. Civil Aeronautics Board, 183 F.2d 839, 842 (D.C. Cir. 1950). As the court noted in Armstrong Cork Company v. Lyons, 366 F.2d 206(8th Cir.1966)

A court may not, without the consent of all persons affected, enter a judgment which goes beyond the claim asserted in the pleadings. (Citing cases). Unless all parties in interest are in court and have voluntarily litigated some issue not within the pleadings, the court can consider only the issues made by the pleadings, and the judgment may not extend beyond such issues nor beyond the scope of the relief demanded. A party is no more entitled to recover upon a claim not pleaded than he is to recover upon a claim pleaded but not proved.

The foregoing rules are all fundamental and state nothing more than the essentials of due process and of fair play. They assure to every person his day in court before judgment is pronounced against him. They cannot be circumvented by allowing amendments to pleadings to change a cause of action after judgment or by entertaining motions to vacate a judgment after it has been entered.

Id. at 208, quoting Sylvan Beach v. Koch, 140 F.2d 852, 861-62 (8th Cir. 1944).

This petition raises an issue for review that is fundamental to our system of resolving disputes in courts. How is a defendant to be afforded: (1) proper notice of the claim against him, (2) an opportunity to be heard, and (3) a meaningful hearing? Although as this Court stated in Mathews v. Eldridge, 424 U.S. 319(1976), what is required due process under the Due

Process Clause of the Fifth and Fourteenth Amendments may vary as the "particular situation demands'", id. at 334, quoting Morrissey v. Brewer, 407 U.S. 471, 481,(1972), it seems clear that insofar as procedural due process is concerned, the above three requisites are absolutely essential.

The Complaint is fatally flawed by an omission to set forth all of the essential facts of the cause of action with sufficient particularity so as to appraise the Petitioner of the nature and extent of the asserted liability on the segregation of down payment for equipment. Johnson v. U.S., 547 F.2d 688, 178 U.S. App. D.C. 391 (1976).

The sole issue of liability, i.e., whether an attorney has deviated from the standard of care in failing to segregate the down payment for equipment was never brought before the trial court by Respon-

dents in their original complaint and pre-trial statement. It was created by the trial court after denying Petitioner's directed verdict. The trial court may attempt to interpret vague allegation, but it cannot imply a fact not alleged. Without any allegation in the complaint, the issue of negligence in failing to segregate the down payment for equipment should never have gone to the jury. Rodgers v. Lawson, 83 U.S. App. D.C. 281,284, 170 F.2d 157, 160(1948). Meek v. Shepard, D.C. App. No. 82-1397 (1984) 113 WLR 57 (1985). Due process requires fair notice of the theories alleged and a reasonable opportunity for the opposing party to present the defense. Autocomp Incorporated v. Publishing Computer Service, Inc., 331 A.2d 338, 340(D.C. 1975). Respondents failed to set forth such theory of recovery in their complaint. It was not even

urged upon the court at trial. Thus, it caught Petitioner in prejudicial surprise. Fundamental fairness dictates that the Petitioner should have a chance to argue against the new theory on merits, to examine the expert's background and opinion prior to trial.

It is through the disposition of this federal question in a way which conflicts with the United States Constitution that the District of Columbia Courts have denied Petitioner Due Process and a fair trial.

The Due Process clause of the Fourteenth Amendment prohibits state governments from depriving any person of life, liberty or property without Due Process of law. The Due Process guarantee requires a fundamentally fair proceeding in which each litigant has the opportunity to present his case and have its merits fairly

judged. See Logan v. Zimmerman Brush Co. (1982) 455 U.S. 422, 102 S.Ct. 1148, 1156. When a state uses its enforcement power to transfer property from one person to another, such as compensatory damages, the requirements of fundamental fairness and procedural Due Process must be met.

In Matthews v. Eldridge (1976) 424 U.S. 319, 96 S.Ct. 893, the Supreme Court set forth a three-part test for determining the level of procedural case by the Due Process clause. In Matthews, the Court stated:

> "(I)dentification of the specific dictates of Due Process generally requires the consideration of three distinct factors: First, the private interest that will be affected by the official action; Second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative

> burdens that the additional or substitute procedural requirement would entail."

Id. at 335 (citation omitted).

This Court has held that the fundamental requisite of due process of law is the opportunity to be heard at a meaningful time and manner and where important decisions turn on questions of fact due process requires the opportunity to confront and cross-examine witnesses.[2] Also, due process requires at a minimum that deprivation of property by adjudication be preceded by notice, a meaningful hearing and the opportunity to be heard.[3]

In the instant case Petitioner contends that he did not receive a fair trial.

Even an implied amendment of the pleadings will not be permitted where it results

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[2] Goldberg v. Kelly, 397, U.S. 254 (1970)

[3] Goss v. Lopez, 419 U.S. 565(1975)

in substantial prejudice to a party, "i.e., whether he had a fair opportunity to defend and whether he could offer any additional evidence if the case were to be retried on a different theory." International Harvester Credit Corporation v. East Coast Truck, 547, F.2d at 890, quoting Monod v. Futura, Inc., 415 F.2d 1170,1174(10th Cir.1969). See also Town of Orangetown v. Gorsuch, 718 F.2d 29, 40 n.10(2d Cir.1983); 6 Wright & Miller, Federal Practice and Procedure: Civil §1493, at 467-68(1971); 3 Moore's Federal Practice ¶15.13(2), at 173(2d ed. 1984).

In this case, Petitioner had no fair opportunity to defend and offer expert testimony to rebut the newly added theory of the standard of care for an attorney to segregate the portion of downpayment for equipment. This theory was never brought up in the complaint or pretrial statement. It was raised by the lower court only at the time of the trial for the jury after the

denial of directed verdict. Petitioner not only was not given a proper notice of the claim but was also not given a reasonable time and opportunity to present the defense.Therefore, the lower court had denied Petitioner's due process rights.

In Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S.673,50 S.Ct.451(1930), this Court granted the petition for certiorari and reversed the state court. The Supreme Court found the Missouri Supreme Court had denied plaintiff's due process rights because the effect of its judgment was to deprive the plaintiff of property without affording it an opportunity to be heard in its defense.

In reaching its conclusion that the Missouri State Supreme Court had violated the plaintiff's due process rights, the United States Supreme Court examined the concept of due process violations commit-

ted by the judiciary. It stated:

> "The federal guaranty of due process extends to state action through its judicial, as well as through its legislative, executive, or administrative, branch of government.
>
> It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that this court's power to review decisions of state courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by party relied, does not give rise to a claim under the 14th Amendment or otherwise confer appellate jurisdiction on this court.
>
> . . .
>
> But, while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

Id. at 680-682; 50 S.Ct. at 4.

It is clear that Petitioner had been deprived of his right to due process of law when the trial court created a new theory and cause of action for the jury to decide, upon which theory the cause was neither set forth in the complaint, nor briefed, nor urged upon the court at trial.

2. Petitioner's rights to due process under the Fourteenth Amendment were violated when the trial court permitted a District of Columbia attorney to testify the applicable standard of care, skill, prudence and diligence required of Maryland attorney in a malpractice claim. Petitioner's motion for a directed verdict should have been granted where the Respodents had failed to make a prima facie showing of the applicable standard of care by qualified expert testimony. In the Dis-

trict of Columbia, the legal theory of professional malpractice was stated in Morrison v. MacNamana, 407 A.2d 555, 560-561(D.C. App. 1979):

> The elements which govern ordinary negligence actions are also applicable in actions for professional negligence. The plaintiff bears the burden of presenting evidence "which establishes the applicable standard of care, demonstrates that this standard has been violated, and develops a causal relationship between the violation and the harm complained of." (citation omitted).***
>
> ***(A) lawyer must exercise that degree of reasonable care and skill expected of lawyers acting under similar circumstances. Cf. Niosi v. Aiello, D.C. Mun. App., 69 A.2d 57(1949)***.

The court followed the rule and states in O'Neil v. Bergan, 452 A.2d 337, 341(D.C.App.1982).

> "In a legal malpractice action, the plaintiff must present expert testimony establishing the standard of care unless the attorney's lack of care and skill is so obvious that the trier of fact can find negligence as a matter of common knowledge."

In O'Neil, the Court held that where the plaintiff failed to call in the experts to testify as to the standard of care, the plaintiff failed to make out a prima facie case of legal malpractice.

Hansen v. Wightman, 14 Wash App. 78, 538 P.2d 1238(1975); Cook, Flanagan & Berst v. Clausing, 73 Wash. 2d 393, 438 P.2d 865(1968). In Hansen, supra, the Supreme Court of Washington holds that the correct standard to which the plaintiff is held in the performance of his professional skill is that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in the jurisdiction.

In the instant case, the corporation was formed in Maryland, known as Pagoda International, Inc. It entered into an

agreement with Carpel Corporation to purchase restaurant equipment and construct restaurant. The restaurant was located in Maryland. The lease was made in Maryland. The substantive law to be applicable concerning the interpretation of the sales contract is that of Maryland.

Respondents have failed to present a competent expert witness who was a member of the Maryland Bar with a knowledge of purchase of restaurant equipment and construction of restaurant in the State of Maryland. The conventional source of expert testimony upon the existence and interpretation of law of another state is a lawyer engaged in the practice of such state, 31 Am. Jur. 2d Expert and Opinion Evidence §371. The geographical limitation on the standard of care is that of the state. Here, the Respondents' expert witness, Mr. Friedlander,

admitted that he was not a member of the Bar in Maryland, that he had not represented Chinese restaurant in Maryland and that he was not familiar with the Chinese restaurant operation. Mr. Friedlander does not have the requisite knowlege or practical experience to make him competent to testify regarding the applicable standard of care in the state of Maryland. Respondents offered no evidence to show that Mr. Friedlander had had professional occasion to investigate the Maryland law as to attorney's duty to segregate that of part of down payment for equipment purchase or that it was pointed out and explained to him by a reputable attorney in the State of Maryland.

In response to a hypothetical question of an attorney representing the tenant, the restauranteur, Would a failure to have those monies placed in escrow, or insure that they are placed in escrow,

be a breach of the standard of care? He stated: "If you're dealing with a reputable, very financially credit worthy contractor, generally deposits are not required." He never testified as to the standard of care, but rather only what is desirable and what he would do under similar circumstances. Moreover, the Respondents' contractor, Carpel Corporation had been doing business of restaurant remodeling and selling restaurant equipment for over twenty(20) years in Maryland, District of Columbia and Virginia. It was a very financially credit worthy contractor. The Respondents have not provided evidence otherwise. Therefore, following Mr. Friedlander's testimony, deposits are not required.

To constitute an instrument in escrow, it must be deposited with the intention that it shall take effect on the

performance of an express condition or the happening of a certain event. In the absence of such condition or contingency, a mere understanding, expectation or promise that something will be done is insufficient. As a general rule, the condition must be a part of a contract between the parties. See Escrow §4 30 A C.J.S. P. 972. The intention of the parties here was not to put the downpayment in escrow. There was no written or oral escrow agreement between Pagoda Corporation and Carperl Corporation to require the escrow of part of the down payment for the equipment. It is not possible to determine how much money of downpayment is to be placed in escrow for equipment unless the lender, equipment company and Respondents have agreed in writing. There was no written evidence on the purchase agreement that any part of the Respondents' down payment was to be used for equipment pur-

chase. Without an expert testimony from a Maryland attorney as to how much of the down-payment was to be placed in escrow for equip-ment, no reasonable juror could have deter-mined what the standard of care was. In the absence of adequate proof of standard of care, the present case should never have gone to the jury.

3. Petitioner's actions were not, as a matter of law, the proximate cause of Respondents' loss.

Proximate cause is a test of whether injury is the natural and probable con-sequences of the negligent or wrongful act and ought to be foreseen in the light of circumstances. Spar v. Obwoya, 369 A. 2d 173(D.C.1977). A defendant may not be held liable for harm actually caused when the chain of events leading to injury appears highly extraordinary in retrospect. Morgan v. District of Columbia, 468 A.2d

1306(D.C. 1983).

Petitioner has exercised that degree of reasonable care and skill expected of lawyers under similar circumstances in dealing with Carpel Corporation which at that time was a financially credit worthy contractor. Respondents' only expert testimony, Mr. Friedlander, stated "If you're dealing with a reputable, very financially credit worthy contractor, generally deposits are not required". Petitioner has not deviated from the normal practice of attorneys in similar circumstances in not demanding deposit of part of downpayment. The bankruptcy of Carperl Corporation was an unforeseen circumstances and appears highly extradordinary. Therefore, Petitioner should not be held liable for harm actually caused by the bankruptcy of Carpel Corporation.

An attorney cannot simply escrow a portion of downpayment for equipment unless all parties involved in the purchase agree-

ment agree on such an action by an attorney. The Respondents have provided no evidence or testimony to indicate that the other two parties, Carpel Corporation and the bank, would agree on such escrow. Petitioner has offered testimony from Mr. Rosenfield, the President of Carpel Corporation, that the downpayment is not in any way to be placed in escrow by an attorney. To claim negligent act of an attorney in not segregating and holding the portion of downpayment for equipment in escrow in a purchase agreement is ludicrous unless the parties concerned have expressed consent to such escrow. Can an attorney hold any sum of the downpayment without the consent of the seller and purchaser?

Moreover, Petitioner simply cannot segregate any portion of downpayment for equipment when the checks were made payable to Carpel Corporation directly and not to the Petitioner. Petitioner, as an attor-

ney, has no control of the downpayment in question. Respondents have agreed to place the money in the hands of Carpel Corporation after they have examined and ratified the purchase agreement and wrote two checks payable to Carpel Corporation directly. To claim that Petitioner is negligent for not segregating the portion of money for equipment is unfair and unjust when the Petitioner has no power and authority to hold the money since the money was not in his hand.

Respondents failed to prove that Petitioner's negligence can in anyway be connected to damages sustained. Items of damages sustained by a client which are not attributable to his attorney's negligence are not recoverable §273 Attorney & Client, 7A C.J. In Jones v. Wright, 91 S.E.265,19 Ga. App.242, where the loss sustained by a client as a creditor is due to his debtor's insolvency rather than to an attorney's ne-

gligence, the client suffers no loss. Accordingly, a creditor cannot recover costs and expenses for an action against an insolvent debtor from a negligent attorney. Lawson v. Sigfris, 262 P.1018,83 Colo.116. Here, the loss of downpayment resulted from the bankruptcy of Carpel Corporation, an insolvent contractor. There is no evidence to suggest that Petitioner proximately cause the damages. Therefore, Respondents should not be allowed to recover damages against an insolvent contractor from their attorney.

CONCLUSION

For the foregoing reasons, Petitioner has been deprived of his rights to property and a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment. This Court is requested to vacate the decision of District of Columbia Court od Appeals. In the alternative, Petitioner

prays that a Writ of Certiorari should be issued to review said decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Winston Wen-Hsiung Tsai, Petitioner herein and a member of the Bar of the Supreme Court of the United States, certify that on June 21, 1985, I served three copies of the foregoing Petition for Writ of Certiorai with Appendix on Glenn H. Carlson, Esq., Attorney for Respondents, by mailing the same by certified mail, return receipt requested, to his office 2600 Virginia Ave., N.W., Suite 209, Washington, D.C. 20037.

Winston Wen-Hsiung Tsai

Winston Wen-Hsiung Tsai
Petitioner, Pro Se

A P P E N D I X

DISTRICT OF COLUMBIA COURT OF APPEALS
500 Indiana Avenue, N.W.
Washington, D.C. 20001

Nos. 82-1079 and 82-1080

WINSTON WEN-HSIUNG TSAI, Appellant,

v. CA10124-78

ROBERT CHENG LIANG LI, ET AL., Appellees.

BEFORE: Pyror, Chief Judge; Nebeker, Mack, Newman, Ferren, Belson, Terry and Rogers, Associate Judges.

O R D E R

On consideration of appellant's petition for rehearing en banc, and it appearing that no judge of this court has called for a vote thereon, it is

ORDERED that appellant's petition for rehearing en banc is denied.

PER CURIAM

Filed March 26, 1985,
Alan I. Herman
Clerk

Copies to:

Honorable Carlisle Pratt

Clerk, Superior Court

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DISTRICT OF COLUMBIA COURT OF APPEALS

No. 82-1079

WINSTON WEN-HSIUNG TSAI, APPELLANT,

v.

ROBERT CHENG LIANG LI, ET AL., APPELLEES.

No. 82-1080 CA10124-78

ROBERT CHENG LIANG LI, ET AL., APPELLANTS,

v.

WINSTON WEN-HSIUNG TSAI, APPELLEE.

Appeals from the Superior Court of the District of Columbia,
Civil Division

(Hon. Carlisle E. Pratt, Trial Judge)

Argued January 23, 1985
Decided February 13, 1985

Before: Pryor, Chief Judge, and Belson and Terry, Associate Judges.

MEMORANDUM OPINION AND JUDGMENT

In this legal malpractice action, Winston Wen-Hsiung Tsai, a member of the Bars of the District of Clumbia and Maryland, appeals a jury verdict awarding Robert Cheng Liang Li and Betty Hsiu Feng Li judgment in the amount of $25,529.24 plus costs. This dispute arose when the Lis lost money given to Carpel Equipment Corporation (Carpel) as a

downpayment on restaurant construction and equipment when Carpel went bankrupt. The Lis brought suit against Mr. Tsai-- their attorney in dealing with Carpel -- for negligence, gross negligence, breach of trust, and breach of contract. The negligence count alleged, in general, that Tsai had failed to take adequate steps to protect the down payment money. After directed verdicts were entered on the counts of gross negligence, breach of fiduciary duty, and breach of contract, the jury returned a verdict awarding the Lis judgment for negligence.

Tsai now challenges this verdict, claiming that a directed verdict should have entered on the negligence count, error by the trial judge in not instructing the jury on defenses of contributory negligence, assumption of the risk, ratification and estoppel, and in allowing the Lis to bring suit in their individual names rather than in the names of their corporation. Because we find

these claims to be without merit, we affirm.[1]

After some earlier discussions at a party in 1974, the Lis contacted Tsai to determine the initial step to be taken in setting up their own Chinese restaurant. Tsai indicated that a corporation should be established, and Mrs. Li authorized Tsai to set up a corporation on the Lis behalf. In March, 1975 Pagoda International, Inc. (Pagoda), a Maryland corporation, was formed.[2] Later that month, Mrs. Li visited Tsai's office to examine Pagoda's corporate charter. At their meeting, Mr. Tsai informed Mrs. Li that he would take care of all legal aspects of the

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[1] The Lis filed a cross appeal in this case to protect the record in the event that Mr. Tsai were to prevail on one of the claims in this appeal. Because we affirm this case in all respects, we do not consider the claims raised in the Lis' cross appeal.

[2] Throughout the time period relevant to this case, no stock certificates in Pagoda were issued, no corporate meetings were held, and corporate officers were informally assigned by Tsai and changed from time to time.

corporation and that he would introduce the Lis to Maury Rosenfield, President of Carpel.[3]

In April, 1975, Tsai introduced Mrs. Li to Rosenfield. On July 14, 1975, Mrs. Li learned from Tsai that Rosenfield knew of a suitable location that was soon to become available in the Willoughby Apartments in Chevy Chase, Maryland. Subsequently, the Lis learned that Rosenfield knew of the Willoughby space because he had previously entered a contract with Mr. Tin Chee Chan to construct a Chinese restaurant there. The Willoughby space had become available because Mr. Chan's plans to build a restaurant had fallen through.

The next day, the Lis, Rosenfield, and Tsai met to examine the space at the Wil-

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[3]Tsai had known Rosenfield since early 1973, and had worked with him on construction of four or five restaurants. Carpel had been in business for approximately 20 years as of the time of the events giving rise to this action.

loughby. After the site visit, the four met with David Carpen, attorney for the Willoughby. The discussions with Carpel centered on the proposed lease, as well as construction and financing of the restaurant.

The Lis primary concern at this point was that the estimated cost of $140,000.00 for the restaurant, based on the plans for Mr. Chan's restaurant, was too high. During the next four days, the Lis negotiated with Rosenfield, and as a result, many of the original items in Mr. Chan's contract with Rosenfield were eliminated. The new price, after modifications, was $125,000.

On July 20, 1975, the Lis were to go on vacation. At Tsai's suggestion, the Lis gave Tsai a power of attorney to permit him to continue negotiations with Rosenfield and the Willoughby during their vacation. The Lis also gave Tsai three checks drawn on their personal checking account -- two for their future landlord (if the lease was executed)

and one representing a 25% down payment to Carpel.

On or about July 22, 1975, Tsai executed the lease for the Willoughby on the Lis behalf. The lease was in the name of Pagoda and was signed, "Bob Li by Winston Tsai, Attorney". Tsai gave Carpel two checks -- one for the first month's rent, and the second for a security deposit.

In the Lis' absence, Tsai also executed a letter agreement with Carpel detailing equipment purchases and construction of the restaurant. No security agreement or promissory note was executed by Tsai on behalf of the Lis at this time. However, at the time the letter was executed, Tsai gave Carpel the Lis' personal check in the amount of $37,589.28 representing a 25% down payment on the cost of construction and equipment for the restaurant, The letter agreement apparently required that any changes in the plans for the restau-

rant be completed by August 3, 1975.

Following August 3, the date all changes were to become final, no construction took place on the restaurant and no equipment was delivered. On September 19, 1975, Tsai wrote Rosenfield, requesting, among other things, that he "[P] repare a formal sales contract between Carpel Equipment Corporation and Pagoda International, Inc. concerning the remodeling of a Chinese restaurant at the Willoughby . . ." When no response was forthcoming, Tsai prepared a proposed work schedule for Carpel. but that agreement was never signed. On October 15, 1975, a formal agreement was prepared for execution. At that time, however, the Lis were informed that before Rosenfiled could begin construction, he would require an additional payment of $4,933.04.[4] The Lis tendered

[4]This increased down payment was the result of an increase in the cost of the equipment and construction for the restaurant.

a check to Carpel in this amount and executed the papers. Still, no work on the restaurant occured. On October 30, 1975, a limited amount of equipment was delivered to the restaurant site. On October 31, 1975, Rosenfield informed Tsai that Carpel had gone bankrupt, and that the Lis would get none of their money back.

In their complaint, the Lis alleged negligence based on Tsai's handling of their downpayment to Carpel.[5] At trial, the sole issue submitted to the jury was

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[5]In particular, the Lis claimed negligence in Tsai's giving the down payment to Rosenfield without first: securing a binding and enforceable agreement, determining that Carpel had obtained financing, obtaining a financial statement from Carpel, requiring Carpel to obtain a performance bond, depositing the money in escrow, or providing such "ordinary, customary and necessary safeguards as are usually required of ordinary prudence in representing clients in the same or similar circumstances.

whether Tsai had been negligent for failing "to secure [the] downpayment on equipment." The jury returned a verdict for plaintiffs and awarded the Lis judgment in the amount of $25,529.24.

II

Tsai's primary claim on appeal is that a directed verdict as to negligence should have been entered because the Lis failed to make a prima facie showing of the applicable standard of care by expert testimony. This claim is divisible into two contentions: that the expert witness called by the Lis was not properly qualified, and that testimony was not presented as to the applicable standard of care. We reject both contentions.

In an action for professional negligence, "[t]he plaintiff bears the burden of presenting evidence 'which establishes the applicable standard of care, demons-

trates that this standard of care has been violated, and develops a casual relationship between the violation and the harm complained of "O'Neil v. Bergan,452,A.2d 337,341(D.C. 1982)(quoting Morrison v. MacNamara, 407 A. 2d 555,560(D.C.1979)(citations omitted). The uniform standard of care applicable in all negligence actions is reasonable care under the circumstances, Id.(citation omitted). In a suit against an attorney for negligence, this standard requires that the lawyer,"exercise that degree of reasonable care and skill expected of lawyers acting under similar circumstances. "id.(citation omitted).

In the District of Columbia, the plaintiff in a malpractice action"must present expert testimony establishing the standard of care unless the attorney's lack of care and skill is so obvious that the trier of fact can find negligence as a matter of common knowledge. "Id. (citations omit-

ted). Because the subject matter of the dispute in this case does not fall within the common knowledge exception to the expert testimony requirement,[6] the Lis were required to present expert testimony on the standard of care. An expert's qualifications to express an opinion on a particular matter are "for the determination of the trial judge and his decision will ordinarily not be distrubed on appeal except for a clear showing of abuse of discretion." Waggaman v. Forstmann, 217 A.2d 310, 211 (D.C. 1966) (citations omitted); See also Hughes v. Pender, 391 A.2d 259, 262 (D.C. 1970); Fraser v. Crounse, 56 A.2d 54, 56 (D.C. 1947).

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[6]Situations within the common knowledge exception to the expert testimony requirement include "typical failures to act" . allowing the statute of limitations to run on a client's claim, or permitting the entry of a default against the client. O'Neil v. Bergan, supra, 452 A.2d at 342 (citations omitted).

In this case, an extensive voir dire of the expert witness -- Mr. Stephen Friedlander -- was conducted at trial. The voir dire showed that Mr. Friedlander was a graduate of Georgewotn University Law Center and has been in the private practice of law in the District of Columbia for 19 years. Voir dire further showed that ninety-five percent of Mr. Friedlnader's private practice consited of "contract work, mainly in the area of real estate, construction, restaurants, representing developers, landlords, tenants and restauranteurs." Mr. Friedlander testified that he was familiar with the standard of care for an attorney in representing either a contactor or tenant restauranteur "both in the District of Columbia and .. Maryland." Based on this testimony, the trial judge found Mr. Friedlander qualified to offer expert testimony on the standard of care applicable in this

case. Clearly, there as no abuse of discretion in this finding.

It is argued, however, that because the witness was not a member of the Maryland Bar, he was not qualified to testify on the standard of care operative in Maryland. However, it is established in the District of Columbia that "a lawyer of one jurisdiction is qualified to testify as an expert with respect to legal services rendered in a neighboring jurisdiction." Fraser v. Crounse, supra, 56 A.2d at 56 (member of District of Columbia Bar qualified to give expert testimony as to customar fees for legal services in Virginia). Indeed, the fact that a lawyer is the member of the bar in another jurisdiction does not render him incompetent to testify but only bears on the weight of his testimony. Id.(citations omitted).[7] Thus, Tsai's claim is un-

[7]Moreover, appellant is scarcely in a position to raise this claim in light of the fact that he was not a member of the Maryland Bar during the time period at issue in this case.

persuasive.

In his testimony, Mr. Friedlander outlined the standard of care to be followed by an attorney in representing a client in dealings with a company performing the dual roles of construction contractor and equipment supplier. Mr. Friedlander testified as to the standard of care that, "[t]he obligation of the attorney is, obviously, to see to it that that deposit is applied to the particular equipment ordered, for the benefit of his client". Friedlander explained that this would be done by

> [s]egregating the order -- segregating the equipment from the construction, having independent ordering, making checks payable to the equipment company as well as the manufacturer. Beyond that, you're really relying on the financial credit worthiness of the company.

Tsai offered no qualified expert testimony to challenge this articulation of

of the standard of care.[8] In these circumstances, we conclude that there was adequate testimony on the applicable standard of care for the case to be submitted to the jury.

III

It is also contended that the evidence failes to establish that Tsai's conduct proximately caused the Lis' loss. Finding ample evidence to support proximate cause, we reject this claim.

To prevail in a legal malpractice action, a plaintiff must establish not only that their attorney acted negligently, but also that the "negligence resulted in and was the proximate cause of loss to the client." Niosi v. Aiello, 69 A.2d 57, 60

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[8] Different versions of the standard of care were presented in testimony by Mr. Tsai and Mr. Rosenfield. However, neither Mr. Tsai nor Mr. Rosenfield were properly qualified as experts prior to testifying as to the standard of care.

(D.C. 1949); see also O'Neil v. Bergan, supra, 452 A.2d at 341; McCord v. Bailey, 204 U.S. App. D.C. 334, 339, 636 F.2d 606, 611 (1980), cert. denied, 451 U.S. 983 (1981). In arguing that his conduct did not proximately cause the injury, Tsai asserts that, "[t]he loss of [the] down payment was caused by the bankruptcy of Carpel Corporation and not the Appellant's conduct." He further argues that the hospitalization of Maury Rosenfield (which) allegedly precipitated Carpel's bankruptcy)"were unforseen acts (sic)," and that "[i]f the Appellee's claim had any merit, it was against a third party (Carpel Corporation) who was insolvent and therefore judgment proof."

This argument fails because it plainly miscontrues the showing required to establish proximate cause. Implicit in this analysis is the premise that attorney conduct is the proximate cause of a

client's loss only if the conduct is the sole cause of the loss. However, the law in the District of Columbia recognizes that proximate cause in a negligence action can be found when the defendant's actions are a "substantial factor" bringing about the loss complained of. Lacy v. District of Columbia, 424 A.2d 317, 318-22 (D.C. 1980). It is also clear that a negligent act or omission which is a concurrent proximate cause of injury may likewise serve to establish liability.

Applying these concepts to this case, it is clear that the Lis made a sufficient showing that Tsai's negligence proximately caused their loss. By not taking adequate steps to protect that part of the down payment money to be used for the purchase of equipment, Mr. Tsai left the entire sum of money exposed to loss in the event of Carpel's bankruptcy. Had Mr. Tsai taken adequate steps to protect the money,

the bankruptcy would not have resulted in the loss of the entire downpayment. That the bankruptcy of Carpel was also a cause of the loss of downpayment does not negate the fact that Tsai's negligence proximately caused the Lis' injury.

IV

Lastly, it is argued that the trial judge erred in allowing the Lis to bring suit on their own behalf. Super. Ct. Civ. R. 17 (a) provides, in part, "every action shall be prosecuted in the name of the real party in interest". Tsai argues that under this rule, suit should have been brought by Pagoda, because the corporation -- and not the Lis -- was the real party in interest in this case. This claim is without merit.

In this case, the Lis were properly allowed to prosecute the action on their own behalf because the down payment money handled by appellant was in the form of

a check drwan on the personal account of the Lis'. Thus, it was the Lis' money, and not that of the corporation, that was put at risk by Tsai's negligence. Cf. United Federation of Postal Workers, AFL-CIO v. Watson, 133 U.S. App. D.C. 176, 184-85 n. 4 409 F.2d 462, 470-71 n.4, cert. denied, 396 U.S. 902 (1969) (modern function of rule is to protect the defendant against a subsequent action by the party actually entitled to recover) (citations omitted). Thus, the Lis were properly determined to be the real parties in interest in this suit.[9] Accordingly, it is,

[9]Tsai's final contention that the trial judge committed error in not instructing the jury on the defenses of contributory negligence, assumption of risk, and ratification and estoppel is barely worthy of comment. Simply put, the facts of this case provide no basis whatsoever for the assertion of these defenses. Cf. Theobald v. Byers, 193 Cal. App. 2d 147, __, 13 Cal. Rptr. 864, 866 (Cal. Dist. Ct. App. 1961) (plaintiffs not contributory negligent for failure to inquire into precisely those matters they hired their attorney to handle).

ORDERED and ADJUDGED that the decision on review be, and hereby is, affirmed.

FOR THE COURT:

/S/ Alan I. HERMAN
Clerk of the Court.

Copies to:

Hon. Carlisle E. Pratt

Clerk, Superior Court

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

ROBERT CHENG LIANG LI	:	
&	:	
BETTY HSIU FENG LI	:	
	:	
Plaintiffs	:	
	:	
v.	:	Civil Action No.
	:	10124-78
WINSTON WEN-HSIUNG TSAI	:	
	:	
Defendant	:	

JUDGMENT

This action came on for trial before the Court and a jury, The Honorable Carlisle E. Pratt, Associate Judge presiding and the iss es having been duly filed and the jury having duly rendered its verdict, it is this 21st day of May, 1982

ORDERED BY THE COURT

That the plaintiffs, Robert Cheng Liang Li and Betty Hsiu Feng Li recover of the defendant, Winston Wen-Hsiung Tsai, the sum of $25,529.24 with interest from date of judgment at the rate of 14 per cent as provided by law and costs of this action.

THOMAS A. DUCKENFIELD,CLERK

BY: /s/
Deputy Clerk

(2)

Office-Supreme Court, U.S.
FILED
JUL 22 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-1983

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

WINSTON WEN-HSIUNG TSAI

Petitioner

v.

ROBERT CHENG LIANG LI
AND BETTY HSIU FENG LI

Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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BEST AVAILABLE COPY

LIST OF PARTIES

The names of all parties to the proceedings in the District of Columbia Court of Appeals and, as well, in the Superior Court of the District of Columbia, are contained in the caption of the case in this Court.

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No. 84-1983

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

WINSTON WEN-HSIUNG TSAI,

Petitioner,

v.

ROBERT CHENG LIANG LI
and BETTY HSIU FENG LI,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

COUNTER-STATEMENT OF ISSUES

This is a suit brought by the respondent clients of the attorney petitioner for legal malpractice arising from their loss of certain downpayments which the attorney negligently failed to protect.

Had the attorney petitioner protected these downpayments, the subsequent bankruptcy of the contractor could not have had any effect upon them. Instead, as there was no protection, when the contractor filed for bankruptcy the respondents' downpayments were irretrievably lost. After trial, the jury returned a verdict in favor of the respondent clients, which verdict was in all particulars affirmed by the District of Columbia Court of Appeals. Tsai v. Li, Nos. 82-1079 and 82-1080, Memorandum Opinion at 1, n.1 (D.C. Feb. 13, 1985), [hereinafter cited as Mem. Op.]; which appears in Appendix to Petition for a Writ of Certiorari to the District of Columbia Court of Appeals at 4, n.1 [hereinafter cited as App.].

In this court, the petitioner cloaks each of the issues he presents in

the cloth of due process, although he failed to do so in any lower court. In fact, petitioner's first issue was not even briefed for the consideration of the District of Columbia Court of Appeals. In his second issue the petitioner attorney erroneously relies upon the due process clause of the Fourteenth Amendment, instead of the like clause of the Fifth Amendment which properly applies to the District of Columbia. See Bolling v. Sharpe, 347 U.S. 497 (1954). In the third issue that he asks this court to consider as reason to issue a writ of certiorari, the petitioner attorney phrases the issue in terms of the action of the District of Columbia Court of Appeals in an effort to bootstrap a due process consideration from an issue of what constitutes proximate cause. With

this background, in the context of the facts of this case, the issues should be phrased as follows:

1. Did the complaint of the respondent clients provide to the petitioner attorney legally sufficient notice of a claim that the downpayments should have been protected?

2. May an attorney expert witness, who is admitted to practice law in the same jurisdiction as is the defendant attorney, testify as to the standard of care required where the events subject to the litigation transpired in a neighboring jurisdiction where neither were members of the Bar?

3. Is the "substantial factor" criterion a proper statement of proximate cause, where more than one cause resulted in the same damage?

COUNTER-STATEMENT OF THE CASE

The statement of the case provided to this court by the petitioner is replete with misleading statements, error and irrelevant materials. Simply put, in this action of legal malpractice, the respondent clients claimed, in their first count, that the petitioner attorney was negligent in tendering to the contractor certain downpayments without first

> securing a binding and enforceable agreement, determining that ... [the contractor] had obtained financing, obtaining a financial statement from ... [the contractor], requiring ... [the contractor] to obtain a performance bond, depositing the money in escrow, or providing such 'ordinary, customary and necessary safeguards as are usually required of attorneys of ordinary prudence in representing clients in the same or similar circumstances.'

Mem. Op. at 3, n.5; App. at 9, n.5. It was this count which went to the jury on the issue of the necessity of segregating

that portion of the downpayment which related to equipment purchase. With the exception of contradictory statements by the petitioner as to his asking for financial statements from the contractor,[1/] and whether the letter dated July 19, 1975, constituted a formal sales agreement, there were no factual disputes on whether the petitioner did the specific things alleged before turning over the downpayment: He did not do them.

Contrary to the implication of the statements of the petitioner, at the time of the events from which this litigation arose, the petitioner attorney was only licensed to practice law in the District of Columbia. See Petition for a Writ of Certiorari to the District of Columbia Court of Appeals at 4, Tsai v. Li, No. 84-1983, October Term [hereinafter cited

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1/ The credibility of the petitioner was an issue at trial, where he was impeached.

as Petition]; cf. Mem. Op. at 5, n.7; App. at 14, n.7. Ironically, the petitioner continues boldly to proclaim that he represented the respondents in the State of Maryland, in this restaurant transaction, even though for any unlicensed attorney to take a fee for any type of legal service rendered in the State of Maryland without being a licensed Maryland attorney constitutes a misdemeanor. Md. Ann. Code, art. 10, § 32; and see Md. Ann. Code, art. 10, § 1; and 61 Op. Md. Att'y. Gen. 43 (1977). The petitioner admits incorporating the respondents, he admits negotiating a lease for the rental of space for the restaurant, he admits negotiating a construction/equipment agreement, all in the State of Maryland. Mem. Op. at 2-3; Petition at 5-7. In attempting to foist responsibility

upon the respondents for his negligent acts, the petitioner continues to assert that the respondents negotiated directly with the contractor and that an amended agreement resulted. Petition at 6-7. Both of these assertions were contradicted by the respondents; Mrs. Li denied that she ever negotiated directly with the contractor during the period at issue (Trial Transcript at 167) [hereinafter cited as Tr.], and the petitioner -- himself -- wrote to the contractor two months after the supposed "purchase agreement" of "July 19, 1975" (Petition, at 6) had been signed, requesting that the contractor "[p]repare a formal sales contract...." Mem. Op. at 3; App. at 8.

Finally, the trial court ruled that all of the financial dealings of the respondent clients following the bankruptcy of the contractor were

irrelevant to the issues presented by the litigation. Tr. at 185-187. The petitioner's reportage of events following the contractor's bankruptcy (Petition at 7-8) not only bears that stamp, but is in error -- when the restaurant was sold it was sold at a loss to the respondents, a loss not including the money lost by the negligence of the petitioner.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

The first question presented by the petitioner attorney involves an issue which was not briefed by the parties before the District of Columbia Court of Appeals. The issue was not presented to the trial court, either at trial or thereafter. In essence the petitioner here asks this court to issue a writ of certiorari as he had no notice of a claim that certain monies should have

been protected. The petitioner claims that he

> had no fair opportunity to defend and offer expert testimony to rebut the newly added theory of the standard of care for any attorney to segregate the portion of the downpayment for equipment. This theory was never brought up in the complaint or pretrial statement. It was raised by the lower court only at the time of the trial for the jury after the denial of directed verdict. Petitioner not only was not given a proper notice of the claim but was also not given a reasonable time and opportunity to present the defense.

Petition at 20-21. In their complaint the respondent clients alleged legal malpractice. That claim was never changed. In their complaint the respondent clients alleged that the downpayments should have been placed in escrow, and that failing to do so breached the standard of care for a lawyer. That allegation was tried. The respondent clients offered an

expert witness to establish this standard. In fact, this was a "Civil 1" case, which was assigned under the system of the Superior Court of the District of Columbia to a given judge, supposedly from complaint to appeal; here three judges were, in seriatim, assigned to the case. Two of these, Judges Thompson and Pratt, long before trial and in the presence of the petitioner, told the plaintiffs that they would not allow the case to go to the jury without expert testimony. Yet, the petitioner never asked an interrogatory regarding expert witnesses, and even after the pretrial statement of the plaintiffs identified their expert, no request to depose him was made by the petitioner. Further, at trial, the petitioner did not offer any expert testimony. Mem. Op. at 5, n. 8; App. at 16, n. 8.

Now the petitioner wants to present an expert. In the instant petition is the first time he has suggested that he might even need one. Had the petitioner taken the time to frame interrogatories or depose the expert of the respondents, he would have ascertained the testimony of the expert before trial. At trial, the petitioner did not express surprise at the testimony of the expert, nor should he have: Malpractice was alleged and the standard, it was alleged, required placing the entire downpayment in escrow -- segregating it. The expert testified that only part of the downpayment should have been segregated, not all of it as was alleged.

The petitioner does not claim, nor can he, that he did no know that the contract was for both construction and equipment. Likewise, as he negotiated

the contract, he cannot claim he did not know the downpayment included monies for both construction and equipment. In fact at trial the petitioner stipulated to the amount of the downpayment which should have been applied towards the purchase of the equipment. There was proper notice of the claim against him. There was no surprise. The petitioner announced ready for trial and, therefore, he was prepared to try the whole of the downpayment being required to be segregated without an expert testifying in his defense; the whole included both construction and equipment monies. The lesser was included in the greater. The petitioner had notice.

Further, in their complaint the respondents alleged that the petitioner had failed to provide them such "ordinary, customary and necessary safeguards as are

usually required of attorneys of ordinary prudence in representing clients in the same similar circumstances." Mem. Op. at 3, n. 5; App. at 9, n.5. Petitioner never requested further specification of this allegation. Thus, petitioner's complaint to this court comes too late and solely as a result of his own failures, both to make timely use of the discovery procedures available to him and to timely claim surprise at trial having failed to take proper discovery. There has been no due process violation. Quoting Professor Clark with approval in Kuhn v. Civil Aeronautic Board, 183 F.2d 839, 841, n. 3 (D.C. Cir. 1950), cited by the petitioner, the court underscores the problem here: "If ...[the defendant's] case is prepared adequately he will not be surprised. Our solicitude for him will simply result in giving him opportunities to delay the case

and harass his opponent." Clark, Code Pleading 30 (1928). This was not a trial by ambush. The petitioner had both notice of the claim and the means to find out more. See Jimenez v. Tuna Vessel "Granada," 652 F.2d 415, 420 (5th Cir. 1981).

The second issue presented by the petitioner relates to the qualifications of the expert witness who established the standard of care. It is well settled in the District of Columbia that the qualifications of an expert witness to express his cr her opinions on particular matters are for the determination of the trial judge, and that the trial judge's decision "will ordinarily not be disturbed on appeal except for a clear showing of abuse of discretion." Waggaman v. Forstmann, 217 A.2d 310, 311 (D.C. 1966). Thus, the first issue is whether the trial abused

its discretion in qualifying Stephen H. Friedlander, Esquire, as the expert witness to establish the standard of care.[2/]

A proper voir dire of Mr. Friedlander was conducted at trial. Tr. at 248-253. The voir dire showed that Mr. Friedlander had been practicing law in the District of Columbia for nineteen years; that he had been graduated from Washington-Lee University and Georgetown University Law School; that he was a member of the American Bar Association, the D.C. Bar Association and Phi Delta Phi; that he had been in private practice for the entire nineteen years he practiced law; that his practice

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2/ No expert testimony was offered by Mr. Tsai in contradiction to that of Mr. Friedlander. Mr. Tsai did testify as to his opinion without being qualified; Mr. Rosenfield, who is not a lawyer. did testify as to his equipment firm's practices. See Mem. Op. at 5; App. at 15-16.

consisted of commercial law, "real estate, construction, restaurants, representing developers, landlords, tenants and restauranteurs." Tr. at 249-250. Mr. Friedlander testified that he was familiar with the standard of care for an attorney in representing either a contractor or a tenant restauranteur "both in the District of Columbia and ... Maryland." Tr. at 250.

Mr. Friedlander also admitted he was not licensed to practice law in the State of Maryland. Tr. at 252. As Mr. Tsai was only admitted to practice law in the District of Columbia at the time of the events of which complaint was made, the proper standard by which he is to be judged is the standard for the District of Columbia, and not as he posits, the standard for Maryland. As the District of Columbia Court of Appeals put it, the

petitioner "is scarcely in a position to raise this claim [that only a Maryland attorney could establish the standard] in light of the fact that he was not a member of the Maryland Bar during the time priod at issue in this case" Mem. Op. at 4-5, n.7; App. at 14, n.7. Following argument upon the voir dire, the trial court allowed Mr. Friedlander to testify as an expert. Tr. at 255, et seq.; and see Mem. Op. at 4; App. at 13-16.

The District of Columbia Court of Appeals (App. at 14) correctly relied in the case of Fraser v. Crounse, 56 A.2d 54 (D.C. 1947) to conclude no abuse of discretion is manifest. In that case an objection was made that a District of Columbia lawyer was not qualified to testify regarding legal fees charged within the Commonwealth of Virginia,

because he was not a member of the Bar of the Commonwealth and the services were rendered in that State. In reversing the lower court's determination that the proffered expert could not testify, the court there said:

> By the great weight of authority a lawyer of one jurisdiction is qualified to testify as an expert with respect to legal services rendered in a neighboring jurisdiction. That he is not a member of the Bar of the other jurisdiction, has had a limited experience there and has only slight knowledge of the fees customarily charged there, does not render him incompetent as a witness but goes only to the weight of his testimony. It was error not to allow the witness to testify. [Id. at 56.]

This is the law of the District of Columbia. As the District of Columbia Court of Appeals properly held, the trial court properly exercised its discretion in allowing Mr. Friedlander to testify. There is no due process issue for this court to consider.

The third issue presented by the petition is that of causation: The petitioner argues that his conduct could not have been the proximate cause of the injury suffered by the respondents, that the proximate cause was the bankruptcy of the construction company. In presenting his argument upon causation to the District of Columbia Court of Appeals, the petitioner adopted the "more favorable result" yardstick. Assuming arguendo that this is the criterion, there can be no doubt that had the petitioner abided by the standard of care established by the expert, and segregated the monies for equipment purchases, that the respondents would have had no claim against him, as a more favorable result would have obtained. This conclusion is reached because instead of losing their money, the

money would have gone directly for the purchase of the equipment.

A more lucid analysis of the relationship between the acts and omissions of the petitioner and the respondents' loss of their money is set forth by John Sherman Myers, in Causation and Common Sense, 5 Miami L.Q. 238 (1951):

> Contrasted with cases involving direct causation are those factual situations regarded as indirect causation, -- where the defendant's act is a substantial factor in bringing about the result of which the plaintiff complains, and where the other elements essential to his case appear, but where the force set in motion by the defendant does not itself come into direct contact with the plaintiff or his property, and does not directly create, or set in motion, a force which does. Nevertheless, although spent itself, the defendant's wrong creates a situation from which there is increased danger of injury of some kind. Acting on the stage thus wrongfully set by the defendant, a new and independent force intervenes, and it is the new force

> that is the direct cause of the result [of which respondents complained], made possible only by the previously active, but now spent force of the defendant.

Myers, Causation and Common Sense, 5 Miami L.Q. 238, 248 (1951) (emphasis added). The "substantial factor" criterion has been adopted by the District of Columbia as a part of proximate cause instructions. Lacy v. District of Columbia, 424 A.2d 317 (D.C. 1980).

In this case, by failing to segregate the funds for equipment purchase, inter alia, the petitioner set the stage. By violating the standard of care in the community, the petitioner created a situation of increased danger of injury to the respondents. His failure to act placed them in a vulnerable and exposed position. The bankruptcy of the contractor did the rest. Causation in law,

and in fact, exists, as the petitioner's placement of the respondents in a more vulnerable position was a substantial factor in their loss of their money. As the District of Columbia Court of Appeals noted, that the bankruptcy of the contractor "was also a cause of the loss of downpayment does not negate the fact that ...[petitioner's] negligence caused the ...[respondents'] injury." Mem. Op. at 6; App. at 19.

CONCLUSION

The petition offers no compelling reason for this court to grant a writ of certiorari directed to the District of Columbia Court of Appeals. There are no issues of national importance involved in this case. There are no splits in decisions between circuits in need of resolution. In fact, there is not even a significant federal question involved.

As shown above, the due process issues presented by the petitioner are bogus; the issues presented by the petitioner are mundane issues of law unique to the District of Columbia. For the foregoing reasons the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Brief in Opposition to Petition for a Writ of Certiorari to the District of Columbia Court of Appeals was hand-delivered to Winston Wen-Hsiung Tsai, Esquire, 1612 K Street, N.W., Suite 702, Washington, D.C. 20006, this 22nd day of July, 1985.

Glenn H. Carlson, Esquire